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NO. 83-

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JOYCE BARR, Petitioner,

-vs-

UNITED AIR LINES, INC.,
ASSOCIATION OF FLIGHT ATTENDANTS,
and LIANE BUIX McDONALD,
Respondents.

CROSS-PETITION FOR WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

1. Are sub-classes required under Rule 23(d) of the Federal Rules of Civil Procedure when competing interests are involved and a particular group is disadvantaged by the litigation stretegy of the class representative?

2. May a class representative who has secured all of the injunctive relief to which she may be entitled, and whose only present interest is in securing back pay, adequately represent a class consisting of persons who seek back pay and injunctive relief as well as those, like the class representative, who seek only back pay?

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Petitioner respectfully prays that a writ of certiorari issue to to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 21, 1983.

OPINIONS BELOW

The opinion of the court of appeals is reproduced in the appendix in No. 83-1180

at 1a-39a and is reported at 717 F.2d 1140. The district court denied petitioner's suggestion for subclassing without written opinion; the oral ruling of the district court is reproduced infra at App. 3-6.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the court of appeals was entered on September 21, 1983 (App., No. 83-1180, 99a-100a); timely petitions for rehearing were denied on October 20, 1983 (App., No. 83-1180, 101a-102a), and November 18, 1983 (infra at App. 1-2.)

RULE INVOLVED

This case involves Rule 23 of the Federal Rules of Civil Procedures, which provides in pertinent part as follows:

(a) One of more members of a class may sue or be sued as representative parties on behalf of all only if

* * *

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(d) When appropriate . . .

(B) a class may be divided into subclasses, and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

STATEMENT

1. Following this Court's decision in United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977), respondent United agreed to reinstate Mrs. McDonald to her former position as a flight attendant with full retroactive seniority.

In a subsequent appeal, the Seventh Circuit held that each prospective class member in this case must establish that

"her retirement was involuntary and on account of the invalid rule to be entitled to relief." McDonald v. United Air Lines, Inc., 587 F.2d 357, 360 n.4 (7th Cir. 1978).

Notice to potential class members revealed that nearly 1700 women claimed to have lost their employment because of the invalid rule.

Prior to the start of the individual entitlement determinations mandated by the court of appeals, the district court held a hearing to assess the "unusual adverse impact," Franks v. Bowman, 424 U.S. 747, 779 n.41 (1976) of reinstatement with full seniority. At the behest of the class representative, this hearing was conducted on the assumption that 1400 of the 1700 claimants would be found entitled to relief and would seek to return to work. (App., No. 83-1180, 65a n.16.)

2. After the district court had found that reinstatement of 1400 claimants would be of "magnitude without precedent" (App., No. 83-1180, 87a), and constituted "unusual adverse impact" sufficient to deny full retroactive seniority (App., No. 83-1180, 92a), petitioner Barr presented her "suggestion for sub-classing" to the district court.

Petitioner suggested that there was a divergence of interest within the plaintiff class between those who, like the class representative, sought only back pay and those, like petitioner, who sought to be reinstated. Petitioner argued that the class representative, who had already been reinstated with full retroactive seniority, had agreed to litigate reinstatment issues on an inflated estimate of the number of returnees in order to increase the size of her backpay award. (App., No. 83-1180, 9a-10a.)

The district court, while agreeing that "conceptually or theoretically, one can certainly contend that there is a conflict" (App. 3, infra), concluded that "there has been nothing to indicate to me a real conflict of interest in terms of representation" (App. 6, infra) and denied the request for creation of subclasses. The district court did, however, permit petitioner (who had theretofore been represented as an unnamed member of the plaintiff class) to appear individually.

3. In an interlocutory appeal from the district court's reinstatement ruling, petitioner argued that "class members who actively want to return to United are being sacrificed to a litigation strategy that favors those seeking financial benefits, rather than work, from this suit." (App., No. 83-1180, 10a.)

The court of appeals overruled petitioner's objections to adjudication of "unusual adverse impact" on the assumption that 1400 claimants would return to work. In the view of the court of appeals, "the number 1,400 [is] a reasonable estimate of persons who will seek reinstatement." (App., No. 83-1180, 11a.)

The court of appeals rejected petitioner's arguments about the adequacy of representation by Mrs. McDonald (App., No. 83-1180, 11a), and concluded that "subclassing [is] unnecessary in view of McDonald's vigorous representation." (Id.)

REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions concerning the typicality and adequacy requirements of Rule 23(a) of the Federal Rules of Civil Procedure.

The class representative in this case has already been reinstated with full

seniority. Her only remaining stake in the case is to maximize her back pay recovery.

Petitioner Barr, however, has not yet been reinstated. Petitioner would gladly trade off back pay for a speedy return to work. Such a litigation strategy, while furthering the interest of petitioner and other class members who seek to return to work, would not benefit the class representative who has already been reinstated with full seniority.

This Court has recognized that Rule 23 prohibits a class representative from seeking to obtain overall relief when "competing interests are involved and particular groups may appear to be disadvantaged." General Telephone Co. of the Northwest v. EEOC, 446 U.S. 318, 331 (1980).

This Court has also recognized that "careful attention to the requirements of Fed.Rule Civ.Proc 23 nonetheless remains indispensable [in employment discrimination cases]." East Texas Motor Freight System, Inc. v. Rodriquez, 431 U.S. 395, 405 (1977); General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 (1982).

In seeking to apply these principles in this case, the court of appeals held that the class representative's "vigorous representation" (App., No. 83-1180, 11a) dispensed with any need for subclassing to accomodate divergent views. But as petitioner argued in the court below, it is precisely because the class representative has "vigorously" sought reinstatement with full seniority for 1400 class members (as she does in this Court in No. 83-1180) that subclasses are required.

The class representative's "vigorous representation" has postponed the final determination of the number of claimants entitled to relief. Rather than structure the proceedings to permit disbursement of back pay to claimants who do not seek to return to work -- a procedure which has been endorsed by United in the district court -- the class representative has pursued a litigation strategy designed to force additional financial concessions from the airline. This strategy ill serves those, like petitioner, who seek to return to work.

This case provides the Court with an opportunity to clarify the situations in which a divergence of interests within a class requires the creation of subclasses. Certiorari should be granted to review the important and recurring questions presented by this case.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

February, 1984

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Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CAROLE ANDERSON ROMASANTA, et al., Plaintiffs, and LIANE BUIX McDONALD, etc., Plaintiff-Appellant, Cross-Appellee,	)	
-vs-	)	82-2660 82-2661
UNITED AIR LINES, INC. et al., Defendant-Appellee, Cross-Appellant.	)	

November 18, 1983

Before Pell and Cudahy, Circuit Judges, and Gibson, Senior Circuit Judge (of the Eighth Circuit, sitting by designation)

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Joyce Barr, intervenor, no judge in active service having requested a vote thereon,** and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

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** Judge Posner did not participate in the consideration of the decision of the petition for rehearing en banc.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

While the above petition for rehearing was pending, the intervenor, Joyce Barr, filed her suggestion of mootness requesting the court to vacate its decision and remand the case to the district court with instructions to consider the question of mootness. The court, being of the opinion on consideration of the suggestion of mootness and the responses thereto that the suggestion was not well taken, the requested relief is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CAROLE ANDERSON ROMASANTA, et al.,	)	
Plaintiffs,	)	70 C 1157
UNITED AIR LINES,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

(April 28, 1982)

* * *

[8] THE COURT: Well, ladies and gentlemen, it is a 1970 case. The question for the last several years has been remedy. I suppose conceptually or theoretically, one can certainly contend that there is a conflict.

I do note that the named plaintiff is someone who already has seniority, so that conceptually one could argue that because she already has seniority, that her main interest is back pay and, therefore, some-

body should be vigorously pushing for reinstatement for people who don't have seniority and aren't back on the job, but I think the argument in the face of what we have been through flies in the face of reality.

I would think from the Air Lines' point of view, the concept that Mr. Meites has not been pushing vigoruosly for reinstatement --

MR. FLAXMAN:

That isn't our concept, Judge. I would like to clear that up now.

Our concept, if I may interrupt you, is that the reinstatement question has been litigated on the hypothesis that there are 1400 people that want to go back to work.

We believe there are only two or 300 who really want to go back to work. If there was a class represntative [9] representing those people, they would come for-

ward and say: Judge, there really are only two or 300 people who want to go back to work.

Their interests and their claims for why they should go back to work with more seniority than what the Court ordered for 1400 is much different. The Court hasn't heard those arguments. Those arguments could not have been presented on behalf of the whole class. That is why we come forward.

* * *

THE COURT:

I think at this juncture we just muddy the water further, because at this point we have 1400 people who, because they say they want to go back to work, are part of the class, and we are then talking about a further division of those who say they want to go back and therefore are part of

the class and really want to go back.

Certainly up until now, there has been nothing to indicate to me a real conflict of interest in terms of representations. If we start getting subclasses at this [10] point, I think we very much muddy the waters in terms of where I hope this is going. I think we ought to stick where we are for the present. If, in the future, there is some reason to believe that the present way we have got it structured does create conflicts in a real sense, then obviously we have to take another look at it. But I think at the present time, I am going to deny your motion without prejudice to renewing it at some future time.

* * *